Denver Law Review

Volume 65
Issue 4 *Tenth Circuit Surveys*

Article 10

February 2021

Criminal Procedure

Steve Louth

CRIMINAL PROCEDURE

OVERVIEW

This article will summarize and discuss five criminal procedure cases decided by the Court of Appeals for the Tenth Circuit during the survey period. The first two cases involve questions arising under the fourth amendment, and the third case concerns rights under the fifth amendment. The final two cases of the survey involves habeas corpus proceedings.

I. FOURTH AMENDMENT— UNREASONABLE SEARCHES AND SEIZURES: *UNITED STATES V. RUCKMAN*

A. *Overview*

Although the Supreme Court in *Katz v. United States*[1] stated that the fourth amendment was intended to protect privacy interests and not property interests, *United States v. Ruckman*[2] held that reference to property interests may be necessary in specific cases to determine whether the privacy interest is legitimate for fourth amendment protection.

B. *Background*

Since 1967, *Katz v. United States* has been the touchstone of fourth amendment analysis. Prior to this decision, property interests governed search and seizure analysis.[3] However, the Supreme Court in *Katz* enunciated the often quoted statement: "[T]he Fourth Amendment protects people, not places."[4] The property interest analysis was replaced by a two-prong privacy test set forth in Justice Harlan's concurring opinion in *Katz*.[5] This test requires "first that a person have

1. 389 U.S. 347 (1967).

2. 806 F.2d 1471 (10th Cir. 1986).

3. Until 1967, the fourth amendment was viewed by the courts as protecting certain private property, not intangible privacy, interests. This analysis permitted law enforcement agents to search without a warrant so long as they did not trespass on private property in the process. *See* Goldman v. United States, 316 U.S. 129 (1942) (search warrant not required when information can be obtained without trespassing, by placing detectaphone on outer wall of defendant's office); Olmstead v. United States, 277 U.S. 438 (1927) (speech projected beyond confines of home over telephone wires is not protected against warrantless seizure).

4. 389 U.S. at 351. In *Katz*, FBI agents placed an electronic bug on a public telephone booth from which Katz, a bookmaker, conducted his business. Under traditional fourth amendment analysis, the FBI agents did not need a warrant since the telephone booth was a public area. *Id.*

The Supreme Court, however, rejected the notion that the fourth amendment protects only private property. The Court stated that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment Protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* at 351-52 (citations omitted).

5. *Id.* at 360-62 (Harlan, J., concurring).

exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable.' "[6] In practice, the first part of the test is rarely a matter of contention and, generally, the ultimate issue is whether or not the defendant's subjective expectation of privacy is one which society is prepared to recognize as reasonable.[7]

No single factor is dispositive in determining whether an individual may legitimately claim, under the fourth amendment, that private property should be free of government intrusion not authorized by warrant.[8] Instead, the court looks at several factors in order to assess the degree to which such a warrantless search infringes upon individual privacy.[9] These factors include the intention of the framers of the fourth amendment, the uses to which the individual has put a location,[10] and a societal understanding that certain areas deserve protection from government invasion.[11]

Notwithstanding the above evolution of fourth amendment analysis, the privacy test enunciated in *Katz* has not impaired the vitality of the "open fields doctrine," which permits law enforcement officers to enter and search open fields[12]without a warrant.[13] The Supreme Court in *Oliver v. United States*[14] stated that the "open fields" doctrine was consistent with its holding in *Katz* because first, open fields are not included within "persons, houses, papers, and effects,"[15] and second, there is no societal interest in protecting the activities generally associated with open fields.[16]

C. *Facts*

Without a warrant, state and federal authorities searched a natural cave located on remote government property which defendant Frank Ruckman had been living in and around for eight months. The entrance of the cave had been sealed by Ruckman with a wooden wall and door.[17]

The authorities had gone to the cave to execute a state warrant for

---

6. *Id.* at 361 (Harlan, J., concurring).

7. *See* Oliver v. United States, 466 U.S. 170 (1984); Rakas v. Illinois, 439 U.S. 128 (1978).

8. *See, e.g.*, Oliver v. United States, 466 U.S. 170, 177 (1984) (citing Rakas v. Illinois, 439 U.S. 128, 152-53 (1978) (Powell, J., concurring)).

9. *Id.* (citing United States v. Chadwick, 433 U.S. 1, 7-8 (1977)).

10. *Id.* at 178 (citing Jones v. United States, 362 U.S. 257 (1960)).

11. *Id.* (citing Payton v. New York, 445 U.S. 573 (1980)).

12. "Open fields" is land that is beyond the area immediately surrounding the home. Oliver v. United States, 466 U.S. 170 (1970).

13. Hester v. United States, 265 U.S. 57 (1924). Justice Holmes concluded in *Hester* that "the special protection accorded by the Fourth Amendment to the people in their persons, houses, papers, and effects, is not extended to the open fields. The distinction between the latter and the house is as old as the common law." *Id.* at 59.

14. 466 U.S. 170 (1984).

15. U.S. CONST. amend. IV.

16. 466 U.S. at 177-80. Its decision was consistent with *Katz*, explained the Court, because society is not prepared to recognize privacy expectations in open fields as reasonable. *Id.* at 178.

17. United States v. Ruckman, 806 F.2d 1471, 1472 (10th Cir. 1986). The land is

Ruckman's arrest, which was issued when Ruckman failed to appear in state court to answer a misdemeanor charge. Ruckman could not be found when the authorities first arrived and searched the cave. Shortly after the authorities found certain firearms, Ruckman appeared and was taken into custody.[18]

Eight days later, local authorities, accompanied by Bureau of Land Management ("BLM") agents, returned to clean out the cave and found thirteen illegal anti-personnel booby traps, resulting in charges being brought against Ruckman.[19] At trial, Ruckman moved to suppress the use of the anti-personnel weapons as evidence, but the motion was denied[20] and thereafter the possession of the weapons formed the basis of his conviction.[21] Ruckman appealed the conviction claiming that the cave was his "home" and that the government's search thereof violated his fourth amendment right to be free from warrantless searches.

D. *Majority Opinion*

The Tenth Circuit first rejected Ruckman's contention that the cave was his home by holding that the cave could not be considered a permanent residence.[22] The court concluded that Ruckman was just "camping" for an extended period of time and that the cave was not a "home" within the meaning of the fourth amendment.[23]

The decision, citing *Katz* stated that in order for the cave to come within the ambit of fourth amendment protection, Ruckman must have had a subjective expectation of privacy in the cave which society was prepared to recognize as being reasonable.[24] In its analysis, the majority assumed that Ruckman had such an expectation and then focused exclusively on whether his expectation of privacy was reasonable under the circumstances.[25]

In concluding that Ruckman's expectation of privacy was not reasonable, the majority's opinion revolved around the fact that Ruckman was a trespasser on federal lands. The decision noted that Congress' power over federal lands is without limitation[26] and that Ruckman was

---

owned by the federal government and controlled by the Bureau of Land Management (BLM). *Id.* at 1472.

18. *Id.*

19. *Id.*

20. *Id.* at 1471-72. The trial court, by minute order, denied the motion without any comment. *Id.* at 1471.

21. Ruckman was convicted for unlawfully possessing destructive devices, within the meaning of 26 U.S.C. § 5845(f)(3), in violation of 26 U.S.C. § 5861(d). 806 F.2d at 1471.

22. 806 F.2d at 1473. By arguing that the cave was his "home," Ruckman had attempted to bring his claim within the literal language of the fourth amendment which guarantees "[t]he right of the people to be secure in their 'persons, houses, papers and effects,' against unreasonable searches and seizures. . . ." U.S. CONST. amend IV.

23. 806 F.2d at 1473. Counsel for Ruckman conceded that he was just "camping" in the cave. *Id.*

24. 806 F.2d at 1472.

25. *Id.*

26. U.S. Const. art. IV, § 3, cl. 2. This clause provides Congress with the authority to make all necessary rules and regulations respecting property belonging to the United

subject to ejectment at anytime.[27] The fact that Ruckman may have subjectively deemed the cave to be his "castle" was not decisive.[28] The legitimacy of the expectation of privacy, explained the court, is not dependent upon whether a person chooses to conceal private activity, but whether the government's intrusion infringes upon the personal and societal values protected by the fourth amendment.[29]

The majority conceded that *Katz* is often cited for the proposition that the fourth amendment protects people, not places, but further explained that the reasonableness of an individual's expectation of privacy *cannot be determined without reference to a place.*[30] As support, the court cited *Oliver v. United States*[31] in which the Supreme Court noted a distinction between "open fields" and "certain enclaves."[32] The greater accessibility of "open fields" *in general*, stated the Court, has meant that these fields are not protected by the fourth amendment, even when the field is surrounded by fences and "No Trespassing" signs.[33] The fact that the owner of an "open field" has attempted to conceal private activity is not a controlling factor; instead the Supreme Court examines the accessibility of *open fields in general.*[34]

In further support of its decision, the court in *Ruckman* cited a case arising out of the First Circuit which held that squatters on public land have no reasonable expectation of privacy.[35] The First Circuit stated the squatters' claim of a reasonable expectation of privacy was "ludicrous" because the squatters knew they had no colorable claim to occupy the land.[36]

States. Pursuant to this authority, the Bureau of Land Management can control access to public land.

27. 806 F.2d at 1473 (citing United States v. San Francisco, 310 U.S. 16 (1940)).

28. *Id.* In other words, Ruckman's expectation of privacy is meaningless unless society recognizes it as being a reasonable expectation.

29. *Id.* at 1474.

30. *Id.* The location of the property searched is a factor in determining whether legitimate expectations of privacy have been violated.

31. 466 U.S. 170 (1984).

32. *Id.* at 179-80. The Court stated that open fields do not provide the setting for those intimate activities that the fourth amendment was intended to protect against government intrusion or surveillance. The Court did not define "intimate activities," but, presumptively, they are those activities which are expected to be private and not subject to public observation. Certain enclaves are those areas in which we normally expect intimate activities to take place. *Id.* at 179.

33. *Id.* In discussing the general accessibility of open fields, the Court stated that "[i]t is not generally true that fences or 'No Trespassing' signs effectively bar the public from viewing open fields in rural areas." *See also* United States v. Rucinski, 658 F.2d 741 (10th Cir. 1981) (although lumber yard was located in secluded mountain valley and was surrounded by barbed wire and no trespassing signs, no unreasonable intrusion occurred when government agents took pictures of the defendants' mill yard from adjacent property), *cert. denied*, 455 U.S. 939 (1982).

34. *Id.*

35. Amezquita v. Hernandez-Colon, 518 F.2d 8 (1st Cir. 1975), *cert. denied*, 424 U.S. 916 (1976). The squatters' homes and belongings were bulldozed after they were asked several days earlier to leave voluntarily. *Id.* at 9.

36. *Id.* at 11. Shortly after the squatters set up a community on government land, officials from two commonwealth agencies visited the squatters on two occasions and tried unsuccessfully to persuade them to leave voluntarily. *Id.*

E. *Dissent*

In dissent,[37] Judge McKay contended first, that the majority's inquiry into whether Ruckman's cave constituted a home within fourth amendment protection was unnecessary; and second, that their reliance on Ruckman's status as a trespasser was not in accordance with *Katz*' elimination of property interests in fourth amendment analysis.[38]

McKay stated that the court's inquiry into whether the cave constituted a home presupposed that only homes are protected by the fourth amendment.[39] He held this to be untrue since the Supreme Court had previously acknowledged that a person could have a legally sufficient interest in a place other than his own home, and still fall within fourth amendment protection from unreasonable government intrusion into that place.[40] McKay asserted that the ultimate issue, as in all fourth amendment cases, was whether the defendant had a reasonable expectation of privacy in the area searched.[41] Although the majority addressed this issue, McKay argued that the majority's conclusion that Ruckman's expectation of privacy was not legitimate was incorrect because it focused on property interests, rather than privacy interests.[42]

Without reference to trespassing and other related property interests, McKay concluded that Ruckman's expectation of privacy was both reasonable and legitimate because the cave contained all of his belongings and he had tried to seal off the entrance of the cave by constructing a wall and door.[43]

F. *Analysis*

By following precedent, the majority was correct in concluding that reference to property interests may be necessary in determining whether asserted privacy interests are legitimate. The Supreme Court, in focusing on these reasonable expectations of privacy, has not altogether abandoned the use of property concepts in determining the presence or absence of privacy interests protected by the fourth amendment.[44] The relationship between property interests and society's perception of the reasonableness of asserted privacy interests was discussed by the Court in *Rakas v. Illinois*.[45] The Court explained that "one who owns or law-

37. United States v. Ruckman, 806 F.2d 1471, 1474 (10th Cir. 1986) (McKay, J., dissenting).

38. *Id.* at 1475-78 (McKay, J., dissenting).

39. *Id.* at 1475-76 (McKay, J., dissenting).

40. *Id.* at 1476 (McKay, J., dissenting) (citing Rakas v. Illinois, 439 U.S. 128 (1978)).

41. *Id.* (McKay, J., dissenting).

42. *Id.* at 1478 (McKay, J., dissenting).

43. *Id.* (McKay, J., dissenting).

44. *See* Oliver v. United States, 466 U.S. 170, 183 (1984) ("The existence of a property right is but one element in determining whether expectations of privacy are legitimate."); *see also* Rakas v. Illinois, 439 U.S. 128, 144 n.12 (". . . by focusing on legitimate expectations of privacy in Fourth Amendment jurisprudence, the Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by that Amendment.").

45. 439 U.S. 128 (1978).

fully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of [his] right to exclude [others]."[46]

The Supreme Court has held that this right to exclude is not dispositive in every case.[47] Even though the person asserting the privacy interest has a property interest, the Court still examines the surrounding circumstances to determine whether the privacy interest is legitimate.[48]

In the instant case, however, the Tenth Circuit found that the Government's property right to exclude was dispositive of Ruckman's privacy interests.[49] This conclusion, without more, was unsupported since the court did not examine factors other than the property rights. Nor did the court explain why a trespasser who is subject to ejectment has no reasonable expectation of privacy. The Supreme Court has stated that property rights and privacy interests are not coterminous.[50] Yet in the instant case, the Tenth Circuit concluded that government officials could disregard Ruckman's makeshift door and search his personal belongings, since the officials had authority to tell Ruckman, a trespasser, to leave.

The court's analogy to "open fields" cases was not supportive of its decision. As Justice Powell stated in *Oliver*, open fields are not protected against unwarranted searches because they do not generally provide the setting for those intimate activities which the fourth amendment was intended to protect.[51] The court's reference to open fields in *Ruckman* was therefore incomplete, since the court did not explain why a cave enclosed with a wall and filled with personal belongings did not provide a setting for protected intimate activities.

Additionally, the majority's reliance on *Amezquita v. Hernandez-Colon*[52] does not strongly support its decision in *Ruckman*. In *Amezquita* the squatters had been asked at least twice by commonwealth officials to voluntarily remove their belongings,[53] and thus the court determined that they had no reasonable expectation of privacy.[54] In the instant case, there was no evidence that Ruckman had been asked to leave. Furthermore, Ruckman had been living in the cave for more than eight months.[55] In light of these facts, the court should have explained why it imputed an absence of privacy rights from the fact that Ruckman had no

46. *Id.* at 143 n.12.

47. *See, e.g., Oliver*, 466 U.S. at 177 (citing Rakas v. Illinois, 439 U.S. 128, 152-53 (1978) (Powell, J., concurring)).

48. *See supra* notes 9-12 and accompanying text.

49. *Ruckman*, 806 F.2d at 1473 ("Ruckman's subjective expectation of privacy is not reasonable in light of the fact that he could be ousted by BLM authorities from the place he was occupying at any time.").

50. *See supra* note 5 and accompanying text.

51. *Oliver*, 466 U.S. at 179.

52. 518 F.2d 8 (1st Cir. 1975), *cert denied*, 424 U.S. 916 (1976).

53. *Id.* at 11.

54. *Id.*

55. *Ruckman*, 806 F.2d at 1472. Ruckman's living in the cave all this time, without being disturbed by the government, is in contrast to the squatters in *Amezquita* who were approached by government officials shortly after moving onto public land.

possessory rights in the cave. In other words, the court failed to explain why society believes that a trespasser has no privacy interests. Moreover, the majority's opinion failed to distinguish Ruckman from campers who camp without permits or overstay their permit. Campers do not own the public land upon which they camp, but would expect to be asked to dismantle their campsites and leave before they would be subjected to a warrantless search. The court's opinion in *Ruckman* leaves one wondering whether campers on government property will have any privacy interests if they remain for a period beyond their camping permits.[56]

II. *UNITED STATES V. MABRY*

A. *Overview*

In *United States v. Mabry*,[57] the court held that when police are involved in undercover drug purchases where the objective is to arrest the seller's suppliers and to confiscate the contraband, a search warrant for the supplier's home does not have to be sought until the identity of the supplier and the location of the contraband is established *to the satisfaction of the police*. This standard is controlling even though exigent circumstances sufficient to excuse the procurement of a search warrant are predictable.

B. *Background*

Typically, police officers must go before a neutral government official[58] and obtain a warrant prior to a search of an individual's premises. The warrant is granted if sufficient facts are presented demonstrating the probability that evidence of a crime can be found in that specific private dwelling.[59] Indeed, the Supreme Court has held that warrantless searches inside a home are presumptively unreasonable.[60] However, there are some "exceptional circumstances" to this presumption that, if met, allow the police to intrude into a private dwelling without a search warrant.[61]

One of the better known exceptions to the warrant requirement is that of *exigent circumstances*.[62] This exception permits police officers to

56. *Id.* at 1474 (McKay, J., dissenting). Judge McKay argued that the majority's decision was a threat to all campers, including senior citizens who live in recreational vehicles. "Under the majority's sweeping language, they could be found at any time to be 'trespassing' on federal lands and be stripped of any legitimate expectation of privacy in their temporary dwellings." *Id.*

57. 809 F.2d 671 (10th Cir.), *cert. denied*, 108 S. Ct. 33 (1987).

58. A neutral government official is a judicial officer or magistrate who is detached from the law enforcement side of government. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443 (1971) (state attorney general is not a neutral and detached government official for purposes of issuing search warrants).

59. Zurcher v. Stanford Daily, 436 U.S. 547, 558, *reh'g denied*, 439 U.S. 885 (1928).

60. Payton v. New York, 445 U.S. 573, 586 (1980).

61. *See* United States v. Jeffers, 342 U.S. 48 (1951); United States v. Erb, 596 F.2d 412 (10th Cir. 1979).

62. For other exceptions to the warrant requirement, see Chimel v. California, 395

enter a private dwelling for some limited purpose if the prosecution establishes that the officers have probable cause and exigent circumstances exist.[63]

Probable cause to search a dwelling exists "when circumstances known to a police officer are such as to warrant a person of reasonable caution in the belief that a search would reveal incriminating evidence."[64] Exigent circumstances exist when officers have reason to believe that criminal evidence may be destroyed[65] or removed[66] before a warrant can be obtained. In assessing whether exigent circumstances exist, the court is "guided by the realities of the situation presented by the record."[67] Courts will not attempt to second-guess the police: the circumstances are evaluated as they would appear to a prudent, cautious and trained officer.[68]

In *United States v. Cuaron*,[69] police entered and secured the defendant's home without a search warrant because they feared that he would destroy or attempt to remove drugs. The police theorized that the failure of the defendant's carrier to return from a drug transaction, at which he was arrested by undercover police, might give notice to the defendant that problems had arisen.[70] The Court of Appeals for the Tenth Circuit upheld the warrantless search by holding that exigent circumstances were created by the two or three hour time delay between the arrest of the courier[71] and the procurement of a search warrant.

C. *Facts*

The defendants, John and Debra Mabry, appealed their convictions of drug related offenses claiming that the trial court committed reversible error by refusing to suppress evidence seized by government officials as a result of an unconstitutional entry into their home.[72] The

U.S. 752 (1969) (after making an arrest, police may conduct a warrantless search of the area within the defendant's (arrestee's) immediate control); Coolidge v. New Hampshire, 403 U.S. 443 (1971) (evidence associated with criminal activity may be seized without a search warrant when police are lawfully on the premises and the evidence is in plain view).

63. United States v. Cuaron, 700 F.2d 582, 586 (10th Cir. 1983) (citing United States v. Erb, 596 F.2d 412, 417, 419 (10th Cir.), *cert. denied*, 444 U.S. 848 (1979); *see, e.g.*, United States v. Chavez, 812 F.2d 1295, 1298 (10th Cir. 1987).

64. United States v. McEachin, 670 F.2d 1139, 1142 (D.C. Cir. 1981) (quoting United States v. Hawkins, 595 F.2d 751, 752 n.2 (D.C. Cir. 1978) (per curiam), *cert. denied*, 441 U.S. 910 (1979)).

65. *Cuaron*, 700 F.2d at 586 (citing *Erb*, 596 F.2d at 418-19).

66. *Id.* (citing *McEachin*, 670 F.2d at 1144-45).

67. *Id.* (quoting *McEachin*, 670 F.2d at 1144).

68. *Id.*

69. 700 F.2d 582 (10th Cir. 1983).

70. *Id.* at 585.

71. The police did not obtain a search warrant until after they had completed the drug transaction and arrested the courier. *Id.*

72. United States v. Mabry, 809 F.2d 671, 676 (10th Cir. 1987). The Mabrys were jointly tried along with co-defendant Roger Sanders. The issues raised here relate only to the Mabrys. Sanders presented only one issue on appeal—he contended that the trial court committed reversible error by denying his requested jury instruction on entrapment. *Id.*

Each of the defendants were found guilty on various counts of conspiracy to distribute

Mabrys specifically sought to exclude evidence discovered by the Albuquerque, New Mexico Police Department, after officers entered their home without consent and conducted a protective sweep of the premises before obtaining a search warrant.[73]

The trial court concluded, and the Mabrys agreed, that the investigating officers had probable cause to search the Mabrys' home and that exigent circumstances had made the warrantless entry necessary.[74] The Mabrys argued, however, that the officers involved had sufficient facts to justify the issuance of a search warrant *before any exigent circumstances arose*.[75] On that premise, appellants specifically argued that "police inactivity and disregard of the procedures available to obtain a search warrant could not justify the warrantless entry into and seizure of a private residence under the guise of exigent circumstances."[76]

The facts giving rise to the warrantless entry and protective sweep of the Mabry residence were derived from an undercover narcotics investigation which was conducted by the Albuquerque, New Mexico Police Department. That investigation consisted of several drug purchase and sale transactions over the course of a month between an undercover officer, Gonzales, and Rodger Sanders, co-defendant. During the course of those transactions, Sanders would not reveal the identity of his source, but did intimate to undercover officer Gonzales that his source lived in nearby Tijeras, New Mexico.[77]

On the morning of the defendants' arrests, Officer Gonzales met with Sanders to discuss the purchase of a large quantity of cocaine. After Sanders stated that he needed to call his source, Gonzales observed and recorded the numbers that Sanders dialed.[78] By early afternoon, the police learned that this telephone number belonged to the defendant, John Mabry.

Two detectives went to survey and photograph the Mabry residence that afternoon. By 7:00 p.m., a photograph of the Mabry residence was made available to ten law enforcement detectives[79] when they met to plan their surveillance strategy for Gonzales' drug purchase that same evening.[80]

When Gonzales and another officer met with Sanders, a disagreement over how much money should be paid in advance for the cocaine,

---

cocaine in violation of 21 U.S.C. § 846 (possession with intent to distribute cocaine); 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B) (distributing cocaine); 18 U.S.C. § 2 (aiding and abetting). *Id.* at 673.

73. *Id.*

74. *Id.* at 679-80.

75. The Mabrys raised a total of seven issues on appeal, and the court ruled in favor of the Government on all seven issues.

76. *Id.* at 678 (quoting Brief for Appellants at 12, United States v. Mabry, 809 F.2d 671 (10th Cir. 1987) (No. 85-2322).

77. *Id.* at 673-75.

78. *Id.*

79. *Id.* The photograph of the Mabry residence was attached to the affidavit in support of a search warrant. *Id.* at 689 (McKay, J., dissenting).

80. *Id.*

and a desire by Gonzales to inspect some of the cocaine, caused Sanders to make two trips to the Mabry residence between 9:00 p.m. and 10:30 p.m. During each trip, Sanders was observed by detectives driving up to the Mabry residence and leaving.[81]

The police did not begin the process of obtaining a search warrant for the Mabry home until after they arrested Sanders at 11:07 p.m. when he returned from the Mabry residence with two ounces of cocaine.[82] At this time, the police also determined that there were exigent circumstances making it necessary for six officers to proceed to the Mabry house in order to secure the home and its contents while awaiting the search warrant.[83]

Detective Gonzales was asked at trial why he did not obtain a search warrant for the Mabry residence after he observed Sanders dialing the telephone of John Mabry. He stated that he did not know who the connection was or where the house was located, and therefore, probable cause was not present.[84]

D. *Majority Opinion*

The majority agreed that Officer Gonzales' observation of Sanders calling the Mabry residence did not create sufficient probable cause to justify the issuance of a search warrant for the Mabry house.[85] Moreover, in determining the reasonableness of police activities, the majority stated that courts must be sensitive to the nature of police investigations and their public interest goals.[86]

The objective of a drug investigation is to effect an undercover transaction with a seller in such a manner that the seller will lead the police to both the supplier and the contraband.[87] In the instant case, the court held it was perfectly proper that the police did not attempt to obtain a search warrant until *the source of the cocaine was established to the satisfaction of the officers*.[88] This did not come to pass until Sanders made his last trip from the parking lot to the Mabry home, after Sanders had been given money to bring back a portion of the one-half pound of cocaine.[89]

After the majority set the standard for obtaining a search warrant,

---

81. *Id.*

82. *Id.* at 690 (McKay, J., dissenting). Officers were dispatched to Albuquerque to obtain a search warrant at approximately 11:30 p.m. The officers who secured the home received the search warrant approximately two and one-half hours later, at 2:00 a.m. *Id.*

83. *Id.* at 674-75. The officers, experienced in drug transactions, feared that John Mabry would get suspicious and destroy incriminating evidence when Sanders failed to return.

84. *Id.* at 674.

85. *Id.* at 677. The majority merely stated that they agreed with Officer Gonzales, and did not discuss why probable cause was lacking at this point.

86. *Id.*

87. *Id.*

88. *Id.* (emphasis added). The majority appeared to be referring to the officers' actual knowledge, and not probabilities.

89. *Id.*

they focused on whether the officers' warrantless entry into the Mabry home was supported by exigent circumstances. The court relied on *United States v. Cuaron*[90] by holding that the officers' fear, that Mabry might grow suspicious about Sanders' failure to return, justified a warrantless entry into the Mabrys' home for the purpose of preventing the destruction of evidence while a search warrant was being obtained.[91]

E. *Dissent*

In dissenting, Judge McKay suggested that although the majority correctly quoted the Mabrys' chief contention on appeal,[92] the majority failed to squarely confront this contention.[93] The court's decision focused entirely on the exigent circumstances which arose between the time of the arrest of Sanders and the warrantless entry into Mabry's home, and not the real issue of whether there was sufficient probable cause far enough in advance of Sander's arrest that a warrant should have been pursued prior to that time.[94]

McKay asserted that it was not the function of a police officer to determine whether there was sufficient probable cause to justify the issuance of a warrant, because "the very person whose behavior is meant to be circumscribed by the warrant requirement is the one who determines whether a warrant should issue."[95] This rule is particularly important, McKay noted, when the rise of exigent circumstances is predictable and inexorable.[96]

McKay also argued that the majority's reliance on *United States v. Cuaron* was misplaced because the issue in *Cuaron* was simply whether the warrantless entry was justified by exigent circumstances, and not, as in the present case, whether probable cause was present before the exigent circumstances arose.[97]

F. *Analysis*

Judge McKay, in dissent, was correct in asserting that the majority

90. 700 F.2d 582 (10th Cir. 1983). In *Cuaron*, the officers in a clandestine drug investigation kept a surveillance on the route of a suspected drug seller to his source/supplier's home one and one-half hours prior to the seller's arrest. The agents, as in the present case, began efforts to obtain a search warrant for the home of the source/supplier, Cuaron, after the seller's arrest. After waiting approximately 40 minutes, the officers proceeded to secure Cuaron's home before the search warrant was obtained. *Id.* at 585.

In upholding the officers' warrantless entry into Cuaron's home, the Court of Appeals for the Tenth Circuit held that waiting to search does not necessarily remove the presence of exigent circumstances, even if the officers may have waited long enough to obtain a search warrant. *Id.* at 590 (citing United States v. McEachin, 670 F.2d 1139, 1145 (D.C. Cir. 1981)); *see* United States v. Johnson, 361 F.2d 832, 842, 844 (D.C. Cir.) (en banc), *cert. denied*, 432 U.S. 907 (1977)).

91. *Mabry*, 809 F.2d at 677-79.

92. See text accompanying notes 77-78.

93. 809 F.2d at 688-89 (McKay, J., dissenting).

94. *Id.* (McKay, J., dissenting).

95. *Id.* at 692 (McKay, J., dissenting).

96. *Id.* at 689 (McKay, J., dissenting).

97. *Id.* at 694 (McKay, J., dissenting).

did not address the Mabrys' chief contention, although it was correctly cited by the court.[98] The majority instead examined the presence of exigent circumstances and concluded that its decision in *Cuaron* was dispositive.[99] The court in *Cuaron*, however, addressed the issue of whether exigent circumstances were present,[100] and did not address the issue of whether a warrantless search was excusable because probable cause to obtain a warrant existed prior to the rise of exigent circumstances.

As Judge McKay noted, there was no evidence presented by the state as to why the officers had not made an attempt to obtain a warrant, other than Officer Gonzales' assertion that he did not think he had probable cause earlier in the afternoon.[101] Thus, there was no evidence to rebut the Mabrys' contention that probable cause existed as late as 7:00 that evening. Despite the absence of evidence, the majority concluded that it was perfectly proper that the police did not attempt to obtain a warrant until the source of the cocaine was established to the satisfaction of the police.[102] The majority also failed to explain, as Judge McKay noted in his dissent, why the officers could not have sought a warrant earlier and waited to execute the warrant later in the day.[103] As a result of this case, the determination of whether probable cause exists is taken away from the judiciary and left in the hands of the police. Such a result is particularly disheartening in the instant case because exigent circumstances are almost always sure to arise in undercover drug operations.[104]

98. The Mabrys contended that "the facts in possession of the police at least five hours before the warrantless entry [of the Mabry residence] would have led any prudent and trained officer to believe that there was a 'fair probability that contraband or evidence of crime' would be found in the Mabry residence. Under the totality of the circumstances of this case, the officers involved had probable cause to search the Mabry residence as early as late afternoon on April 4, 1985, and no later than the strategy meeting at 7:00 p.m." *Id.* at 676-77 (quoting Brief for Appellants at 20-21, United States v. Mabry, 809 F.2d 671 (10th Cir. 1987) (No. 85-2322) (citations omitted)); *see also id.* at 688 (McKay, J., dissenting).

99. In addressing the Mabrys' contention that probable cause existed prior to the exigent circumstances, the court stated "[w]e believe that this court, in *United States v. Cuaron*, . . . effectively put this contention to rest." *Id.* at 678. The majority therefore believed that *Cuaron* was controlling even though the Mabrys did not deny that exigent circumstances were present.

100. *Id.* at 586. The chief contention of the defendant in *Cuaron* was that the police had no objective basis to believe that destruction of criminal evidence was imminent; *see also Mabry*, 809 F.2d at 694 (McKay, J., dissenting).

101. 809 F.2d at 691 (McKay, J., dissenting).

102. *Id.* at 677 (McKay, J., dissenting).

103. *Id.* at 693 (McKay J., dissenting).

104. *See, e.g.*, United States v. Cuaron, 700 F.2d 582 (10th Cir. 1983); United States v. Chavez, 812 F.2d 1295 (10th Cir. 1987) (examples of how predictably the police can proceed without warrants due to the fear of the destruction of evidence, i.e. drugs).

III. FIFTH AMENDMENT—MIRANDA WARNINGS AND VOLUNTARINESS OF CONFESSIONS:

UNITED STATES V. CHALAN

A. *Overview*

In *United States v. Chalan*,[105] the Court of Appeals for the Tenth Circuit elaborated on the definitions of custody for purposes of administering Miranda warnings and eliciting involuntary statements.

B. *Background*

1. Custodial Interrogation

In *Miranda v. Arizona*,[106] the Supreme Court held that the prosecution may not use statements derived from custodial interrogation[107] unless it demonstrates the use of procedural safeguards effective to secure the fifth amendment privilege against self-incrimination.[108] The Court in *Miranda* explained the inherent threat of compulsion in custodial surroundings and that statements obtained from suspects cannot truly be the product of the suspect's free choice unless adequate warnings are employed to dispel the compulsion.[109] Furthermore, the Court stated that it would not pause to inquire in individual cases whether the defendant was aware of his fifth amendment rights without a Miranda warning being given.[110] Thus, the Court laid down a blanket rule which excludes all statements obtained from custodial interrogation unless it is shown that the suspect received adequate warnings as to the availability of the privilege prior to the questioning.[111]

Since the compulsion of self-incrimination is derived from the custodial surroundings and not necessarily the interrogation, statements obtained from police interrogation are admissible so long as the suspect was not in custody at the time of the questioning.[112] The Supreme Court in *Miranda* stated that "[b]y custodial interrogation, we mean

105. 812 F.2d 1302 (10th Cir. 1987).

106. 384 U.S. 436 (1966) (Landmark decision whereby the Court set forth procedural safeguards, now more commonly known as Miranda warnings, which must be followed by police when subjecting suspects to "custodial interrogation").

107. See text accompanying note 115.

108. 384 U.S. at 458-65.

109. *Id.* at 457. Prior to *Miranda*, the admissibility of statements obtained from police interrogation was generally determined by reference to the voluntariness of the statement, in light of due process protection provided by the fourteenth amendment. See text accompanying notes 126-28.

110. 384 U.S. at 467-68.

111. *Id.* at 468 ("The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given.").

112. California v. Beheler, 463 U.S. 1121 (1983) (suspect who voluntarily accompanied police to station house after reporting a homicide was not in custody for purpose of Miranda warnings when he was told that he was not under arrest and afterward was permitted to leave); Oregon v. Mathiason, 429 U.S. 492 (1977) (burglary suspect who voluntarily came to police station for questioning and then left without being arrested was not in custody for purpose of Miranda warnings).

questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[113] Although the question of whether a person is in custody is not very ambiguous, the latter part of the Court's definition of custody—"otherwise deprived of his freedom"—has been the focus of numerous decisions[114] subsequent to *Miranda*.

The Supreme Court in *Miranda* alluded that an accused who was the focus of an investigation must be given Miranda warnings,[115] but the Court has since rejected such an interpretation of "custodial interrogation."[116] Instead, the Court had stated that the ultimate inquiry in deciding the custody question "is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest."[117]In making this determination the Court has examined "how a reasonable man in the suspect's position would have understood his situation."[118]

In *Oregon v. Mathiason*,[119] the Court held that a suspect who "voluntarily" came to the police station in response to a police request was not in custody, and was therefore not entitled to Miranda warnings.[120] In reversing the Oregon Supreme Court, the United States Supreme Court stated that a noncustodial situation was not converted to one in which *Miranda* applies simply because the questioning took place in a coercive environment. A formal arrest or "restraint on freedom of movement" of the kind associated with a formal arrest must be present before Miranda warnings are triggered, even though the questioning takes places in a coercive environment.[121]

2. Voluntariness

The fifth amendment's privilege against self-incrimination prohibits the admission of incriminating statements obtained by government acts, threats, or promises which permit the defendant's will to be overborne

113. *Miranda*, 384 U.S. at 444.

114. *See, e.g.*, Berkemer v. McCarty, 468 U.S. 420 (1984); Florida v. Royer, 460 U.S. 491 (1983); Dunaway v. New York, 442 U.S. 200 (1979); Oregon v. Mathiason, 429 U.S. 492 (1977); Beckwith v. United States, 425 U.S. 341 (1976); Orozco v. Texas, 394 U.S. 324 (1969); Mathis v. United States, 391 U.S. 1 (1968); Osborn v. United States, 385 U.S. 323 (1966); Hoffa v. United States, 385 U.S. 293 (1966).

115. *Miranda*, 384 U.S. at 444 n.4.

116. *See* Beckwith v. United States, 425 U.S. 341 (1976). The Court explicitly rejected the defendant's argument that the mere fact that an investigation had "focused" on him meant that he was entitled to Miranda warnings. *See also* United States v. Ellison, 791 F.2d 821, 823 (10th Cir. 1986).

117. California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curium) (quoting Oregon v. Mathiason, 429 U.S. 492, 495 (1977)).

118. *McCarty*, 468 U.S. at 442. "[A]n objective, reasonable-man test is appropriate because, unlike a subjective test, 'it is not solely dependent either on the self-serving declarations of the police officers or the defendant nor does it place upon the police the burden of anticipating the frailties or idiosyncracies of every person whom they question.' " *Id.* at 442 n.35 (summarizing and quoting People v. P., 21 N.Y.2d 1, 9-10, 233 N.E.2d 255, 260, 286 N.Y.S.2d 225, 233 (1967)).

119. 429 U.S. 492 (1977).

120. *Id.* at 495.

121. *Id.*

and thus rendered involuntary.[122] To determine whether a suspect's statements are made voluntarily, a court examines the "totality of the circumstances" including both the characteristics of the accused and the details of the interrogation.[123]

Prior to *Miranda*, the admissibility of statements obtained from police interrogation was generally determined only by reference to the voluntariness of the statement.[124] The *Miranda* decision did not pre-empt or alter the application of the voluntariness test; instead, the decision merely added another variable into the admissibility of those confessions obtained during custodial interrogation.[125] Statements made involuntarily are still inadmissible, regardless of whether Miranda warnings are given or were not required because the questioning did not constitute "custodial interrogation."[126]

Because the subjective nature of the "voluntariness" test prevents any formulation of clear guidelines, the admissibility of confessions must be determined on a case-by-case basis. The ultimate inquiry, however, is whether the confession was the product of free will.[127] If the confession is not the product of free will, the confession will not be admissible even though it appears to be reliable and not the result of conscious wrong doing by the interrogator.[128] Although no single factor is determinative of the issue of voluntariness, the following factors are important when considering the "totality of the circumstances:" the nature of the questioning, the length of interrogation, the number of interrogators, the suspect's age, education and experience, and the use of physical punishment.[129]

---

122. Malloy v. Hogan, 378 U.S. 1 (1969); United States v. Fountain, 776 F.2d 878 (10th Cir. 1985); United States v. Falcon, 766 F.2d 1469 (10th Cir. 1985).

123. *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973), where the court stated:

> "Some of the factors taken into account have included the youth of the accused, his lack of education, or his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep."

Id. at 226 (citations omitted). *See also* Culombe v. Connecticut, 367 U.S. 568 (1961); United States v. Fountain, 776 F.2d 878 (10th Cir. 1985); United States v. Falcon, 766 F.2d 1469 (10th Cir. 1985).

124. The aim of this inquiry was to determine whether a suspect's right to due process under the fourteenth amendment had been violated. *See, e.g.*, Townsend v. Sain, 372 U.S. 293 (1963) (confession not admissible when obtained after suspect was given drug with truth serum qualities); Rogers v. Richmond, 365 U.S. 534 (1961) (confession induced after police pretended to arrest suspect's sick wife held not admissible).

125. *Miranda* directs that statements are to be excluded, regardless of their voluntariness, if the statements were obtained during custodial interrogation and were not preceded by Miranda warnings.

126. Miranda v. Arizona, 384 U.S. 436, 468 (1966).

127. *Bustamonte*, 412 U.S. at 225.

128. *See Sain*, 372 U.S. 293 (confession held involuntary, even though investigators were unaware of truth serum qualities of drug which they gave to the defendant to suppress symptoms of withdrawal from heroin).

129. *Bustamonte*, 412 U.S. at 226; *see supra* note 124 (for the Court's language listing the factors).

C. *Facts*

Defendant Daniel Chalan, an adult Indian who lived on the Cochiti Pueblo in New Mexico, was identified by a witness as being one of four young Indian males seen near a convenience store at the time that it was robbed and its assistant store manager shot and bludgeoned to death.[130] The day after the robbery and murder, federal and local law enforcement officers contacted Chalan through a message conveyed to him by his mother, and asked him to meet them at the Pueblo Governor's office.[131]

Chalan arrived at the Governor's office, accompanied by his mother. At the beginning of the interview he was explicitly informed that he did not have to answer any questions, that he was not a suspect in the case, and that the officers merely wanted him to provide them with information.[132] The questioning, however, was often accusatory, and the investigators,[133] the Governor, and Chalan's mother exhorted him to tell the truth.

At no time during the interview was Chalan arrested or given any Miranda warnings. After approximately one and one-half hours of questioning, the interview ended and Chalan departed *without ever admitting to any participation* in the robbery and murder.[134]

The day after the interview at the Pueblo Governor's office, Chalan spoke with several of his cousins about the murder and robbery and decided to discuss the crimes with the law enforcement officers again. An FBI agent came to the home of Chalan's cousin after Chalan asked his relative to summon the Bureau. When the agent arrived, Chalan confessed to having committed the crimes before the agent had asked Chalan any questions.[135] The agent then informed Chalan of his Miranda rights and Chalan signed a written waiver-of-rights form and then gave a detailed confession, which was later reduced to writing and signed.[136] The confession occurred approximately twenty-two and one-half hours after Chalan was questioned the day before at the Pueblo Governor's office.[137]

At the suppression hearing preceding the trial, Chalan sought to exclude both his confession made to the FBI agent and his statements made the day before at the Pueblo Governor's office. Chalan argued that he was subjected to custodial interrogation at the Pueblo Gover-

130. United States v. Chalan, 812 F.2d 1302, 1305 (10th Cir. 1987).

131. *Id.* at 1305.

132. *Id.* The officers wanted to know whether Chalan knew anything about the crimes at the convenience store.

133. Chalan was questioned by an FBI agent, two investigators from the Bureau of Indian Affairs, and an officer from the local sheriff's department. *Id.*

134. *Id.*

135. *Id.* The court did not state what Chalan said specifically.

136. *Id.*

137. *Id.* The time frame of the confession sheds light on the validity of Chalan's claim that he was still operating under coercion that allegedly was placed on him at the Governor's office. As more time transpires between the questioning and confession, there is less likelihood that the coercive questioning caused the subsequent confession.

nor's office without first being admonished of his constitutional rights in violation of *Miranda*. Specifically, Chalan argued that his attendance at the interview was compelled by tribal custom, which demands he not refuse a request by the Pueblo Governor to come to his office and which requires him to remain until dismissed.[138]

Alternatively, Chalan argued that his statements at the Pueblo Governor's office were made involuntarily because his mother, the investigators, and the Governor exhorted him to tell the truth. Furthermore, he argued that the confession made the following day was also given involuntarily.

D. *Tenth Circuit Opinion*

1. Custody

The Tenth Circuit affirmed the district court's determination that Chalan could not reasonably have believed that he was in custody during the interview at the Pueblo Governor's office.[139] Chalan's argument that his attendance at the interview was compelled by tribal custom was also rejected by the court.[140] The court stated that it was unconvinced that the Governor's influence sufficiently restrained Chalan's freedom so as to necessitate the safeguards required by *Miranda*, although Chalan had presented evidence at the suppression hearing that suggested that obedience to the Governor is expected of all tribal members.[141]

As in *Mathiason v. Oregon*,[142] the court apparently was not influenced by the coercive and accusatory nature of the interview.[143] The determinative factor was that Chalan came to the interview voluntarily and was free to leave at anytime.[144]

2. Voluntariness

The court assessed the "totality of the circumstances" surrounding Chalan's statements at the Governor's office by examining the personal characteristics of Chalan and the details of the investigation, and con-

---

138. *Id.* at 1307.

139. *Id.*; *see also* United States v. Ellison, 791 F.2d 821 (10th Cir. 1986) (when reviewing denial of motion to suppress, trial court's findings of fact must be accepted unless clearly erroneous).

140. 812 F.2d at 1307.

141. *Id.* In addition to being in charge of the Pueblo police force, the Governor is the head of the Pueblo and presides over the tribal council.

142. 429 U.S. 492 (1977). The defendant in *Mathiason* had been asked to come to the police station to discuss his involvement in a recent burglary. While at the police station, a detective lied to Mathiason by stating that Mathiason's finger prints had been found at the scene of the burglary, when in fact no finger prints were found. Thereafter, Mathiason confessed to committing the burglary, but he was not arrested, and after further questioning was allowed to leave. *Id.* at 493-94.

The Supreme Court held that Mathiason was not in custody despite the coercive environment in which the questioning took place. The important fact, stated the Court, was simply whether Mathiason was free to leave during the questioning. *Id.* at 495.

143. *Chalan*, 812 F.2d at 1307.

144. *Id.* at 1307-08.

cluded that Chalan's statements were made voluntarily.[145] In regard to the details of the investigation, the court noted that Chalan's consistent denial of any participation in the crimes throughout the interview indicated that his free will was not overburdened by the questioning.[146] In addition, although all those present at the Governor's office exhorted Chalan to tell the truth, he was specifically informed at the beginning of the interview that he was not obligated to answer any questions. Finally, the court interpreted the presence of Chalan's mother throughout the interview as an indication that the interview was not unduly coercive.[147]

With respect to Chalan's personal characteristics, the court noted that he was not uneducated and that he also had experience with law enforcement procedures both as an officer for the Pueblo Police Department and as a prior arrestee.[148]

Chalan's confession was also examined, even though the court had already found that he was not subjected to undue coercion at the Governor's office.[149] The court noted that twenty-two hours had elapsed between his confession and the interview at the Governor's office and that, during this time, Chalan did not have any contact with the police. Moreover, Chalan initiated the contact and spontaneously confessed to the crimes upon seeing the FBI agent.[150] Finally, the court found the signed waiver form as strong proof of the voluntariness of Chalan's waiver to remain silent prior to confessing.[151]

E. *Analysis*

The Tenth Circuit aptly applied Supreme Court precedent in concluding that Chalan was not subjected to "custodial interrogation" at the Pueblo Governor's office. Although Chalan was asked by the police to come to the Governor's office, and the interrogation was often coercive and accusatory, the only relevant inquiry was whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.[152] The coercive nature of the environment in which the questioning took place was irrelevant for purposes of Miranda warnings, so long as Chalan remained free to leave.[153]

It was also correct for the Tenth Circuit to reject Chalan's argument

145. *Id.*
146. *Id.* at 1308.
147. *Id.*
148. *Id.* at 1305. Chalan was 22 years old at the time of the investigation and had attended some college. He also had been arrested twice and had earlier worked approximately one year as a law enforcement officer for the Pueblo.
149. Note that Chalan argued that his confession was involuntary because the coercion used in the interview was still operating when he made his confession the next day. Thus, it appears that the court's further examination of Chalan's confession was unnecessary, since the court had already found that the interview was not coercive.
150. *Id.* at 1308.
151. *Id.* (citing United States v. Fountain, 776 F.2d 878 (10th Cir. 1985)).
152. *See* California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curiam); Oregon v. Mathiason, 429 U.S. 492, 495 (1977)(per curiam).
153. *See Mathiason*, 429 U.S. at 495 ("[A] noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the

that his attendance at the Governor's office was compelled because, by tribal custom, he could not refuse the invitation. If the court did not reject this argument, then any citizen who is asked to come to the police station could argue that his sense of civic duty compelled his attendance, and that he therefore could be considered "in custody" for the purpose of Miranda warnings. Such a result would be contrary to the Supreme Court's desire to limit *Miranda* to formal arrests or restrictions on freedom of movements of the degree associated with arrests.[154]

In regard to the voluntariness of Chalan's statements, the court was correct in concluding that Chalan was not subjected to undue coercion at the Governor's office. Since the ultimate inquiry in examining "voluntariness" is to determine whether the suspect's will was overburdened, Chalan's consistent denials illustrate that his will was not overburdened, even though all those present exhorted him to tell the truth.

IV. HABEUS CORPUS—THE RIGHT TO A FEDERAL EVIDENTIARY HEARING:

PHILLIPS V. MURPHY

A. *Overview*

In *Phillips v. Murphy*,[155] the Tenth Circuit Court of Appeals held that habeas corpus petitioners are not entitled to evidentiary hearings in federal court, when their applications are supported by allegations that are vague and conclusory, and are wholly incredible in the face of the record.

B. *Background*

Federal courts in habeas corpus proceedings are empowered to provide trial-like proceedings in which the court may receive evidence and try the facts anew.[156] Indeed, in *Townsend v. Sain*[157] the Supreme Court held that this exercise of power by the federal courts is mandatory when the habeas applicant has not received a full and fair evidentiary hearing in state court.[158]

The Supreme Court elaborated in *Blackledge v. Allison*,[159] however,

absence of any formal arrest or restraint on freedom of movement, the questioning took place in a 'coercive environment.' ").

154. *See Beheler*, 463 U.S. at 1124.

155. 796 F.2d 1303 (10th Cir. 1986).

156. 28 U.S.C. § 2254 (1985); *see also* Townsend v. Sain, 372 U.S. 293 (1963). "The whole history of the writ—its unique development—refutes a construction of the federal courts' habeas corpus powers that would assimilate their task to that of courts of appellate review." *Id.* at 311.

157. 372 U.S. 293 (1963).

158. *Id.* at 312. The defendant in *Townsend* had been injected with a drug to suppress symptoms of withdrawal from heroin before confessing. The defendant was then denied an opportunity in state court to present evidence that the drug had "truth serum" qualities which caused his confession to be involuntary *Id.* at 321-22.

159. 431 U.S. 63 (1977).

that it would be unwise to allow hearings in all federal post-conviction proceedings,[160] and that finality in the sentencing process should be sought for the good of the prisoner and the court.[161] It was recognized that many collateral attacks may be inspired by " 'a mere desire to be freed temporarily from the confines of the prison.' "[162] Despite the concern, the Court stated that the habeas corpus applicant in *Blackledge* was entitled to an evidentiary hearing because the allegations were not vague and conclusory but were supported by specific facts.[163] The critical question, explained the Court, was whether these allegations, when viewed against the record of the plea hearing, were so "palpably incredible," so "patently frivolous or false," as to warrant summary dismissal.[164]

C. *Facts*

The petitioner pleaded guilty in two separate state cases[165] and, after a pre-sentence investigation, received sentences totaling eighty-five years.[166] In so pleading, the petitioner was subjected to extensive inquiry by the state district court judge to determine whether the guilty pleas were voluntary and informed.[167] After sentencing, petitioner

160. *Id.* at 71.

161. *Id.* The defendant can then focus on rehabilitation, and the courts conserve vital resources, such as court time and the expense of revisiting judgments.

162. *Id.* at 72 (quoting Price v. Johnston, 334 U.S. 266, 284-85 (1948)).

163. *Id.* at 75-76. The petitioner in *Blackledge* sought habeas corpus relief on the ground that his guilty plea was involuntary due to an unkept plea agreement. At the state arraignment, the petitioner had entered a guilty plea by responding to form questions on an "adjudication form." One of the form questions asked petitioner whether he understood that he could be sentenced up to life, while another asked whether anyone had made any promises that would influence his plea of guilty. Petitioner was required to only write no or yes, and there were no other records or transcripts of the arraignment. *Id.* at 66 n.1.

Three days after his guilty plea, petitioner was sentenced to 17 to 21 years imprisonment. Thereafter, petitioner sought habeas corpus relief in federal district court claiming that his guilty plea was induced by his attorney's promise that he would get only a 10 year sentence. The petitioner elaborated on his claim with specific factual allegations, indicating exactly what the terms of the promise were; when, where, and by whom it had been made; and the identity of a witness to its communication. *Id.* at 76-77.

The federal district court dismissed the petition without an evidentiary hearing and held that the printed "form" was conclusive evidence that petitioner's guilty plea was voluntary. The dismissal was reversed by the Fourth Circuit. Blackledge v. Allison, 553 F.2d 894 (4th Cir. 1976).

The Supreme Court affirmed the circuit court's reversal by holding that the district court could not fairly adopt a per se rule excluding all possibility that a defendant's representations on the record at the time his guilty plea was accepted were so much the product of such factors as misunderstanding, duress, or misrepresentation by others as to make the guilty plea a constitutionally inadequate basis for imprisonment. *Blackledge*, 431 U.S. at 76.

The Court stated that a petition can be dismissed without an evidentiary hearing when the allegations are vague or conclusory, but not when the petitioner elaborates on his claim with specific factual allegations. *Id.* at 76-77.

164. *Id.* at 76.

165. Phillips v. Murphy, 796 F.2d 1303, 1303 (1986). The petitioner was charged in C.R.F. 80-346 with lewd molestation of a minor. In C.R.F. 80-653, he was charged with one count of robbery with a firearm, one count of first-degree rape, three counts of sodomy and two counts of kidnapping for extortion.

166. *Id.* Petitioner was sentenced to five years imprisonment in C.R.F. 80-346 and 80 years imprisonment in C.R.F. 80-653 to be served consecutively.

167. *Id.* at 1304-05. The state court asked the petitioner in open court whether he was

sought state relief claiming that his guilty pleas were neither voluntary nor intelligently made because he was operating under the impression that the district attorney had agreed to recommend a forty year sentence in exchange for his guilty pleas.[168]

The state court denied the petitioner's application for state post-conviction relief without conducting an evidentiary hearing. The same state district court judge that had questioned the petitioner before accepting his guilty pleas also ruled on the petitioner's motion for post-conviction relief. The state court judge concluded that, in light of the record and prior proceedings, the matter was a question of law and did not require an evidentiary hearing.[169]

Thereafter, pursuant to 28 U.S.C. § 2254,[170] petitioner brought a petition in federal district court for a writ of habeas corpus. The district court dismissed petitioner's petition by order without an evidentiary hearing and petitioner appealed.[171] In addition to his original claim for post-conviction relief, the petitioner argued on appeal that he should have received an evidentiary hearing because his post-conviction proceeding raised material issues of fact.[172]

D. *Tenth Circuit Opinion*

The Tenth Circuit acknowledged that, if the facts are in dispute and the habeas corpus applicant does not receive a full and fair evidentiary hearing in state court, the applicant is entitled to an evidentiary hearing in federal court.[173] However, the applicant is not entitled to an evidentiary hearing when his assertions are wholly incredible in the face of the record.[174]

---

aware of the following: the court was advised that there were no negotiations between the District Attorney's office and his lawyers, whereby there would be any recommended sentence to be presented to the court; that the sentence would be left to the discretion of the court; and that the defendant in the related case who was charged conjointly with the petitioner in C.R.F. 80-653 (alleging robbery with a firearm, first degree rape, sodomy, and kidnapping for extortion) received a 70 year sentence and that the court would probably take that verdict into consideration in determining the petitioner's sentence.

The court also asked whether he was entering his plea of guilty due to any force, or threats or inducements made to him by any officer, attorney, or anyone else. *Id.*

168. *Id.* Since the petitioner stated in court that his guilty plea was not induced by any promises, the assumption must be that petitioner argues he responded negatively in order to receive a lower sentence.

Petitioner also argued that his guilty pleas should be set aside because he was not placed under oath at the time of the plea proceedings. The Fifth Circuit has a supervisory rule which requires that defendants be placed under oath when the court inquiries as to plea agreements. *See* Coody v. United States, 470 F.2d 540 (5th Cir. 1978), *vacated*, 588 F.2d 1089 (5th Cir. 1979) (per curiam).

The Tenth Circuit declined to adopt such a rule and noted that no constitutional basis for the procedural rule was intimated by the Fifth Circuit in *Coody*. Thus, in the Tenth Circuit, statements made in open court during plea proceedings are accepted even when the defendant is not placed under oath.

169. 796 F.2d at 1305.

170. 28 U.S.C. § 2254 (1982).

171. 796 F.2d. at 1305.

172. *Id.* at 1303.

173. *Id.* at 1304 (citing Townsend v. Sain, 372 U.S. 293 (1963)).

174. *Id.* (citing Blackledge v. Allison, 431 U.S. 63, 74 (1977)) ("Solemn declarations in

The court reviewed the record and findings from the plea proceedings and concluded that the petitioner's assertion that the district attorney was to recommend a forty year sentence was *wholly incredible*.[175] The court noted that the petitioner was aware of statements in the plea proceedings indicating there were no negotiations on the sentence and that the judge's sentencing decision would be influenced by a seventy-seven year sentence given to another defendant charged conjointly with the petitioner.[176] Thus, since the petitioner's assertion was found to be "wholly incredible," he was not entitled to an evidentiary hearing in federal court, even though he alleged factual disputes and did not receive the hearing in state court.[177]

Furthermore, the Tenth Circuit held that the state district court's finding that the plea was entered without negotiations with the office of the district attorney was a historical fact[178] subject to a habeas corpus presumption of correctness standard. Thus the petitioner was not free to contest this finding in federal court unless he met the requirements of 28 U.S.C. § 2254(d).[179] Although the ultimate question—whether a

---

open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible."). See text accompanying note 166.

175. 796 F.2d at 1305.

176. *Id.* The court also noted that petitioner did not attempt to support his allegations with specifics as to when or how such an understanding between him and the district attorney was made.

177. *Id.*

178. The factual circumstances surrounding a habeas corpus petitioner's claim are determined by the state court. *See, e.g.*, Patton v. Yount, 467 U.S. 1025, 1036-40 (1984).

179. Section D states:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
>
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
>
> (7) that the applicant was otherwise denied due process of law in the State court proceeding;
>
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record. . . .

challenged confession was obtained in a manner compatible with the Constitution—is generally a matter for independent federal determination,[180] the court found that here the historical fact was dispositive of petitioner's claim for federal habeas relief.[181]

E. Analysis

The Tenth Circuit's decision in *Phillips* was dictated by *Blackledge v. Allison*,[182] in which the Supreme Court made it clear that summary dismissal is appropriate when habeas corpus petitioners state vague and conclusory allegations.[183] The petitioner in *Phillips* failed to include any factual allegations which would support his claim that the district attorney had agreed to recommend a lower sentence in exchange for his plea. Philips summary dismissal was therefore appropriate, unlike in *Blackledge* where the petitioner alleged exactly what the terms of the alleged unkept promise was, who it had been made by, when and where it had been made, and the identity of a witness to the communication.[184] As a result of *Philips*, it is clear that future habeas corpus petitioners will be subject to summary dismissal unless they include factual allegations in the petition to support their claims.

V. Prosecutor's Duty to Disclose Favorable Evidence: *Bowen v. Maynard*

A. *Overview*

The framework for evaluating the materiality of undisclosed evidence has recently been changed by the Supreme Court's decision in *United States v. Bagley*.[185] The Tenth Circuit, in recently decided *Bowen v. Maynard*,[186] held that the standard set forth in *Bagley* is satisfied if the materiality of the undisclosed information meets both standards of *United States v. Agurs*.[187]

B. *Background*

In *Brady v. Maryland*,[188] the Supreme Court held that "the suppression by the prosecution of requested evidence favorable to an accused violates due process where the evidence is material either to guilt or

180. 796 F.2d at 1305 (citing Mitter v. Fenton, 474 U.S. 104 (1985)). While the habeas corpus court is not free to challenge the facts found by the state court, it can disagree with the state's legal conclusions based on those facts.

181. *Id.* Since the petitioner's claim of involuntariness was based on the assertion that the district attorney agreed to recommend a lower sentence, the claim was disposed of by the state court's finding of fact that there were no negotiations conducted with the district attorney.

182. 431 U.S. 63 (1977).

183. See text accompanying notes 161-66.

184. *See supra* note 165 and accompanying text.

185. 473 U.S 667 (1985).

186. 799 F.2d 593 (10th Cir. 1986).

187. 427 U.S 97 (1976).

188. 373 U.S. 83 (1963).

punishment. . . ."[189] Such evidence is commonly referred to as *Brady* evidence.[190]

The law has recently been changed, however, with respect to the framework for evaluating the materiality of *Brady* evidence. Prior to the Supreme Court's decision in *United States v. Bagley*,[191] the materiality of evidence was judged according to three distinct standards enunciated in *Agurs*.[192] These three *Agurs* standards were replaced with one standard in *Bagley*,[193] but it is yet to be determined whether *Bagley* will be applied retroactively.[194]

The Tenth Circuit did not determine in *Bowen* whether *Bagley* should be applied retroactively; rather, they examined the standards set forth in *Agurs*. The applicability of the *Agurs* standards was dependent upon the factual circumstances of each case. First, where the prosecution knew or should have known that its case included perjured testimony, the conviction would be overturned if there was any *reasonable likelihood* that the false testimony could have affected the judgment of the jury.[195] Second, where defense counsel requests disclosure of specific evidence, the request puts the prosecution on notice of its obligation to disclose, and the verdict therefore has to be set aside if the suppressed evidence *might have* affected the outcome of the trial.[196] This test is commonly referred to as the "lower" *Agurs* standard. Third, where the prosecution received no request or a general request for all *Brady* material,[197] the judgment would be set aside if the omitted evidence created a *reasonable doubt* that would not otherwise have existed.[198] This last test is commonly referred to as the "strict" *Agurs* standard.

In *Bagley* the Court replaced the three Agurs standards of materiality with one single test to be applied in all instances of nondisclosure. The Court held that evidence is material only if there is a *reasonable probability* that, had the evidence been disclosed, the result of the proceeding would have been different.[199] "Reasonable probability" was defined as probability *sufficient to undermine confidence in the outcome*.[200]

189. *Id.* at 87. Impeachment evidence also falls within the protection of the Brady rule, if its suppression would deprive the defendant of a fair trial. *See* Giglio v. United States, 405 U.S. 150 (1972).

190. *See* Moore v. Illinois, 408 U.S. 786, 794-95 (1972).

191. 473 U.S. 667 (1985).

192. *See infra* notes 197-200 and accompanying text.

193. *See infra* notes 201-02 and accompanying text.

194. *Bagley* was decided while *Bowen* was on appeal to the Tenth Circuit. Since the Tenth Circuit found that the withheld material satisfied both of the applicable *Agurs* tests of materiality, it held that there was no need to determine whether the unitary test of *Bagley* should be applied retroactively. *Bowen*, 799 F.2d at 603.

195. *Agurs*, 427 U.S. at 103-04.

196. *Id.* at 104.

197. A general request does not give the prosecution notice of any specific obligation, and therefore is treated as though no request was made. *Id.* at 112.

198. *Id.*

199. 473 U.S. 667, 682 (1985); *see also id.* at 685 (White, J., joined by Burger, C.J., and Rehnquist, J., concurring in part and in judgment).

200. 473 U.S. at 682; *see also* Strickland v. Washington, 466 U.S. 668, 694 (1984).

C. *Facts*

Defendant Clifford Bowen was convicted of three counts of first degree murder,[201] in charges stemming from a notorious triple homicide in Oklahoma City, Oklahoma, known as the "Guest House Murders." The three victims were shot at the Guest House Hotel while sitting around a poolside table late at night.[202] The State's theory of the crime was that Bowen was hired by a local drug dealer, Harold Behrens,[203] to kill one of Behrens' conspirators, Ray Peters, whom Behrens feared would turn informant in light of pending drug charges.[204]

The evidence used to convict Bowen consisted primarily of testimony by two witnesses who testified that they saw Bowen in the pool area before the shooting, and that after gunshots were heard, they saw Bowen run and flee in a waiting vehicle. In defense, Bowen claimed that he was not in Oklahoma when the murders occurred, and offered twelve witnesses who testified that he was at a rodeo in Tyler, Texas until midnight on that night.[205]

After Bowen was convicted, his attorneys learned that earlier in the investigation the police had an initial prime suspect, Lee Crowe, who resembled Bowen in physical appearance.[206] Based on this information, the defense attorneys motioned for a new trial claiming that the prosecution withheld exculpatory evidence from the defense in violation of the *Brady* rule.[207] Furthermore, the defense attorneys stated that prior to trial, they had made a specific oral request to the prosecution to pro-

201. Bowen v. Maynard, 799 F.2d 593, 595 (10th Cir. 1986). At trial, Bowen received death sentences on each count. His convictions were affirmed on appeal and the court set his execution for August 12, 1985. *See* Bowen v. Oklahoma, 715 P.2d 1093 (Okla. Crim. App. 1984), *cert denied*, 473 U.S. 911 (1985).

202. *Bowen*, 799 F.2d at 596-98.

203. *Id.* Behrens was formerly a detective in the organized crime detail of the Oklahoma City Police Department. He became a suspect when his former supervisor, Detective Sergeant David McBride, recognized the circulated description of the gunman as being someone who Behrens had investigated while on the force. The supervisor recalled that toward the later stages of the investigation, Behrens quit the department and shortly thereafter Bowen was no longer seen in Oklahoma City. *Id.* at 597.

204. Shortly before the shooting, Behrens and his lover Herman Borden had been sitting at the poolside table with Peters and the two other murder victims. Upon leaving the table, Behrens put his hand on Peters' shoulder and said he would see him tomorrow. A former lover of Behrens testified at trial that it was not Behrens' custom to make physical contact with people upon parting company. The State contended that Behrens' gesture "fingered" Peters for the hit man. *Id.* at 598-99.

205. *Id.*

206. Lee Crowe was employed as a police officer in Hanahan, South Carolina, at the time of the murders. Both Crowe and Bowen fit the description of the shooter: white, six feet two inches tall, 225 pounds, salt and pepper hair, beer belly, and pale complexion. *Id.* at 600.

Crowe also habitually carried a .45 caliber pistol with unusual and expensive silver-tipped hollow point ammunition; the type found at the scene of the murders. *Id.* at 599, 600 n.2.

Bowen's lawyers became aware of Crowe when they were contacted by South Carolina law enforcement agents who suspected that Crowe was a hit man for organized crime. Not until the first day of the federal hearings (five years after Bowen's convictions) did Bowen's attorneys discover the full extent of information which the state had concerning Lee Crowe. *Id.* at 602. *See infra* note 216.

207. *See supra* note 191 and accompanying text.

duce any information concerning other suspects. As a result of the nondisclosure, the defense attorneys argued that the materiality of the undisclosed information might have affected the outcome of the trial and should be judged by the lower *Agurs* standard.[208]

Following an evidentiary hearing to determine the materiality of the withheld information, the state court concluded that the withheld information did not warrant a reversal of Bowen's convictions.[209] The state court applied the stricter *Agurs* standard[210] and found that the evidence did not undermine the confidence of the guilty verdict.[211] It is not clear from the state court record, however, whether the court found that no oral request was made or whether the court simply held that *Brady* requests must be in writing in order to trigger the stricter *Agurs* standard.[212]

After the motion for post-conviction relief was denied in state court, Bowen sought a writ of habeas corpus in federal court pursuant to 28 U.S.C § 2254.[213] Before the petition was addressed by the federal court, Bowen's attorneys obtained police investigative reports from the prosecution[214] which further implicated the earlier suspect, Lee Crowe. Bowen argued to the federal court that the Lee Crowe material was exculpatory within the meaning of *Brady* because it could have been used to impeach witnesses and because it cast doubt on his guilt.[215]

The federal district court held hearings and determined first that the prosecution had in fact received an oral request from Bowen's attor-

208. *See supra* note 198 and accompanying text.

209. 799 F.2d at 603.

210. *See supra* notes 199-200 and accompanying text.

211. 799 F.2d at 601-02.

212. If the court had found that no oral request had been made, this finding would have been a "historical fact" entitled to a presumption of correctness by the federal court. *See* 28 U.S.C. § 2254(d) (1985); *see also* Townsend v. Sain, 372 U.S. 293, 309 n.6 (1963).

213. 28 U.S.C. § 2254 (1982). For a general discussion of habeas corpus proceedings and the purpose of the writ, see Hutson v. Justices of Wareham Dist. Court, 552 F. Supp. 974 (D. Mass. 1982) (remedy is available only when circumstances are presented which demonstrate fundamental unfairness in trial, or the infringement of important constitutional rights).

214. 799 F.2d at 615-18. These reports revealed that Ray Peters, who was considered by police to be the prime target of the murders, was divorced and that his former wife, Patsy Peters, was engaged to Crowe. Patsy and Crowe lived in Hanahan, South Carolina, along with another woman, Deana Burris. Crowe provided protection in their apartment while Patsy and Deana worked as prostitutes.

Ray Peters' mother, Mae Margraves, recalled that Ray had phoned Patsy a week before his death and had told her not to come out to Oklahoma City because he did not want to see her but only his children. He threatened Patsy by telling her that if she came out to Oklahoma he would tell her parents that she was a prostitute. *Id.*

The reports also revealed that South Carolina authorities suspected Crowe to be a hit man, and that on several occasions Crowe had left South Carolina and, upon his return, it was discovered that a homicide had occurred where he had been. Crowe had also been a suspect in a murder unrelated to organized crime. Crowe's former girlfriend had a boyfriend who persisted in bothering her. The boyfriend was later found dead with five bullet wounds in the head. When Crowe was asked to produce his gun, he said that he lost it. *Id.*

Finally, the reports revealed that Crowe and Patsy were in Oklahoma on the day of the murders and that Crowe's exact whereabouts at the time of the murders were undetermined. *Id.*

215. *Id.* at 610.

neys for prior suspects.[216] The court then applied the lower *Agurs* standard to the withheld evidence, including the police investigative reports which were not before the state court, and held that Bowen's convictions were constitutionally invalid.[217] The State appealed, claiming that the withheld material was not exculpatory within the meaning of *Brady*.

D. *Tenth Circuit Opinion*

The Tenth Circuit held that the prosecution had a federal constitutional duty to reveal the Lee Crowe material either with or without a specific request by the defense. In holding that the withheld material met both applicable *Agurs* tests,[218] the court declined to determine whether the unitary test[219] of *Bagley* should be applied retroactively.[220]

The court first examined the district court's finding of an oral request for other suspects, and concluded that the finding was supported by both federal and state court records and was not clearly erroneous.[221] The decision then stated that a specific oral request which is not on the record is legally equivalent to a formal, written motion for purposes of the prosecution's duty to disclose favorable evidence. The oral request gives the prosecution specific notice of exactly what the defense desires.[222]

The court then noted that the State's case against Bowen was based upon testimony of two identification witnesses, whose testimony may not have been flawless.[223] Lee Crowe's marked resemblance to the description of the suspect could have been used by the defense to impeach the witness' identifications of Bowen.[224] Furthermore, the opinion noted that the police reports documenting the connection between Lee Crowe and one of the victims to organized crime in South Carolina

216. *Id.* at 605-06. During questioning by the court, the prosecution conceded that an oral request had been received from Bowen's attorneys. This concession overcame any presumption of correctness, to the extent that the state record could be interpreted to include a court finding that no oral request had been made, and thus a historical fact entitled to a presumption of correctness. *Id.* at 609.

217. *Id.* at 613.

218. *See supra* notes 198-200 and accompanying text.

219. *See supra* note 201 and accompanying text.

220. 799 F.2d at 603.

221. *Id.* at 607.

222. *Id.* at 603. The standard for judging the materiality of information not disclosed after a specific request is lower than the standard for evaluating the materiality of nonrequested information because the specific denial has a greater affect on strategic decisions. Thus, in the absence of any specific denial by the prosecution that there were no prior suspects, the defense is less likely to pursue that line of inquiry than if they had never requested such information. *See* United States v. Bagley, 473 U.S. 667, 682-83 (1985) ("the more specifically the defense requests certain evidence . . . the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption.").

223. 799 F.2d at 611. One witness had only viewed the suspect from a distance of 85 feet, and the other witness had undergone hypnosis to sharpen her memory before trial and had possibly misidentified a police detective in a live line up.

224. *Id.* at 610. *See also* Giglio v. United States, 405 U.S. 150 (1972) (suppression of evidence which could be used to impeach witnesses violates the Constitution if it deprives the defendant of a fair trial).

would have alerted the defense to focus on the motive, opportunity, and ability to kill of Lee Crowe.[225] Therefore, the Crowe material would have been invaluable in undermining the identifications of the witnesses.[226]

The court further held that the Crowe material cast doubt not only upon the testimony of witnesses, but on Bowen's guilt. The court rejected the State's argument that *Moore v. Illinois*[227] was controlling, because unlike the instant case, there was no evidence in *Moore* that the undisclosed prior suspect had any opportunity, motive, or ability to kill the victim.[228] In contrast, Lee Crowe was a suspected hit man living with the ex-wife of one of the victims and was visiting Oklahoma at the time of the murders. In addition, Bowen offered twelve witnesses who said that he was in Tyler, Texas, at the time of the murders. Furthermore, the only supportable motive Bowen could have to commit the murders was money, but the prosecution offered no proof that Bowen received any payment.[229]

While it was admittedly within the province of the jury to weigh the credibility of Bowen's alibi, the court concluded that the jury would have viewed Bowen's alibi differently had it been given the opportunity to learn of Lee Crowe's existence.[230] The court held therefore that the stricter *Agurs* test,[231] in addition to the lower test, had been met because the undisclosed evidence created a reasonable doubt that Bowen committed the murders.[232]

E. *Analysis*

The Tenth Circuit's decision in *Bowen v. Maynard* illustrates the complex application of the *Agurs* standards. These standards require that the court first make factual determinations as to the circumstances giving rise to the nondisclosure before evaluating the materiality of the withheld information.[233] The complexity of applying these standards is compounded by the court's decision in *Bowen*, because it means that reviewing courts cannot rely just on the record for determining what material was or was not requested by the defense. It is clear from the court's decision that the courts must conduct factual inquiries to determine whether or not certain oral requests were received by the prosecution and, if so, what was the nature and scope of the information requested.

The Supreme Court's replacement of the *Agurs* standards with the unitary standard set forth in *Bagley* will probably not reduce the type of

225. 799 F.2d at 611.
226. *Id.*
227. 408 U.S. 786 (1972).
228. 799 F.2d at 611.
229. *Id.* at 612.
230. *Id.*
231. *See supra* notes 199-200 and accompanying text.
232. 799 F.2d at 612.
233. The factual circumstances surrounding discovery requests determine what *Agurs* standard will be applied. *See supra* notes 197-200 and accompanying text.

extensive fact finding illustrated in *Bowen*.[234] Justice Blackmun, joined by Justice O'Connor, stated in *Bagley* that a specific request by the defense for certain evidence should be taken into account in applying the unitary standard.[235] The *Bagley* Court recognized that an incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist.[236] This in turn may cause the defense to rely on this misleading representation and abandon lines of independent investigations, defenses, or trial strategies that it might otherwise have pursued.[237]

Thus, although the court in *Bowen* applied the *Agurs*standards, the future application of the unitary *Bagley* standard will be affected by the holding in *Bowen* that oral requests for discovery are equivalent to written requests.

Steve Louth

234. *See Bowen*, 799 F.2d at 613 (reviewing the lower court proceedings and record of oral arguments to determine whether an oral request for prior suspects was received by the prosecution); *see also supra* note 214 (for applicability of *Agurs* standards).

235. *Bagley*, 473 U.S. at 683-84.

236. *Id.*

237. *Id.*